

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

LINDA McKENNA and TINA IACONA	:	
Administratrices to the Estate of	:	
Nicholas Iacona a/k/a Joey Stefano,	:	
	:	
Plaintiffs,	:	CIVIL ACTION
	:	
v.	:	
	:	
SANDFORD MEISNER THEATER,	:	
et al.,	:	01-CV-660
	:	
Defendants.	:	

MEMORANDUM

BUCKWALTER, J.

July 18, 2001

Presently before the court is Alyson Publications, Inc.’s (“Defendant”) Motion to Dismiss and Linda McKenna and Tina Iacona’s (“Plaintiffs”) response thereto. For the reasons stated below, Defendant’s motion will be granted.

I. BACKGROUND

Plaintiffs are Linda McKenna and Tina Iacona, Administratrices to the Estate of Nicholas Iacona, a/k/a Joey Stefano (“Decedent”), who died intestate on or about November 21, 1994. Plaintiffs brought this action on behalf of Helen Iacona, the sole beneficiary of Decedent’s Estate. Defendant is Alyson Publications, Inc., a Delaware corporation, with its principal place of business in Los Angeles, California. Plaintiffs filed this suit against eighteen separate defendants in the Court of Common Pleas, Delaware County. Defendant removed this suit to the

United States District Court for the Eastern District of Pennsylvania based on federal question and diversity jurisdiction pursuant to 28 U.S.C. § 1332, 28 U.S.C. §§ 1441 (a) and (b), and 28 U.S.C. § 1446.

This action arose out of Defendant's publication of Wonderbread and Ecstasy: The Life and Death of Joey Stefano (the "Book"). The Book recounts Decedent's apparent success as a rising star in the gay pornographic movie industry until his death in 1994. Plaintiffs plead seven counts in their Complaint. Counts I, II, and III assert that Defendant violated Pennsylvania's common law right of publicity and section 43(a) of the Lanham Act. Plaintiffs also bring Counts IV, V, and VI alleging interference with contractual relations, unfair competition, and unlawful taking of property. Finally, Plaintiffs claim that on account of alleged harm to Decedent's reputation, they have suffered and will continue to suffer because of diminishing revenues from their legal "exploitation" of Decedent's name and likeness.

II. DISCUSSION

A. Personal Jurisdiction

1. Legal Standard

The standard by which a court must judge a Rule 12(b)(2) motion differs from that governing a Rule 12(b)(6) motion. While a 12(b)(6) motion requires a court to accept the allegations of the non-moving party as true, a 12(b)(2) motion "requires resolution of factual issues outside the pleadings, i.e., whether in personam jurisdiction actually lies." Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61, 66 n.9 (3d Cir. 1984). Once the defense has been raised, the plaintiff must sustain its burden of proof in establishing jurisdictional facts

through sworn affidavits or other competent evidence rather than mere allegations. At no point may a plaintiff rely on the pleadings alone in order to withstand a defendant's Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction. Id.

2. Discussion

Defendant asserts that Plaintiffs' complaint must be dismissed because Plaintiffs have alleged no facts which would allow the Court to exercise personal jurisdiction over Defendant. Plaintiffs counter that the Court's jurisdiction is proper because the Book names, references, and targets residents of Pennsylvania. Plaintiffs argue that Defendant should have expected that a substantial impact of the book would be felt in Pennsylvania and therefore Defendant reasonably could have anticipated being hauled into court in Pennsylvania.

Whether personal jurisdiction over a non-resident defendant is proper requires a two-part inquiry. First, a district court sitting in diversity must determine whether the long-arm statute of the forum state would permit the courts of the forum state to exercise jurisdiction over the defendant. See Fed. R. Civ. P. 4(e); Imo Indus. v. Kiekert AG, 155 F.3d 254, 259 (3d Cir. 1998). Second, a district court must ask whether asserting personal jurisdiction would be consistent with the dictates of the due process clause. See id. The Constitutional limitations on the exercise of personal jurisdiction differ depending upon whether a court seeks to exercise general or specific jurisdiction over a non-resident. See Mellon Bank (East) PSFS, Nat'l Ass'n v. Farino, 960 F.2d 1217, 1223 (3d Cir. 1992). General jurisdiction permits a court to exercise personal jurisdiction over a non-resident for non-forum related activities when the defendant has engaged in "systemic and continuous" activities in the forum state. See Helicopteros Nacionales de Colombia, S. A. v. Hall, 466 U.S. 408, 414-16 (1984). In the absence of general jurisdiction,

specific jurisdiction permits a court to exercise personal jurisdiction over a non-resident defendant for forum-related activities when the “relationship between the defendant and the forum falls within the ‘minimum contacts’ framework” of International Shoe Co. v. Washington, 326 U.S. 310 (1945). Mellon Bank, 960 F.2d at 1221.

While Plaintiffs generally allege that the Court has personal jurisdiction over Defendant, they do not specify whether the Court’s jurisdiction is general, specific, or both. The Court finds that Plaintiffs have failed to allege sufficiently that this Court has general jurisdiction, and therefore will only address whether the Court can exercise specific personal jurisdiction over the Defendant.

Specific jurisdiction is proper under constitutional due process standards where two showings are made. First, the plaintiff must demonstrate that the defendant has the requisite minimum contacts with the forum state. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985); Imo Indus., 155 F.3d at 259. These contacts must be such that the defendant’s conduct in the forum state demonstrates the purposeful direction or availment which underlies the personal jurisdiction inquiry. See Burger King Corp., 471 U.S. at 472; Imo Indus., 155 F.3d at 259. Where the conduct of the defendant is such that he reasonably should have foreseen being hauled into court in the forum state, the necessary minimum contacts have been shown. See World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). If the necessary minimum contacts do not exist, then courts inquire whether the existence of personal jurisdiction would comport with traditional notions of “fair play and substantial justice.” See International Shoe Co., 326 U.S. at 316; Burger King Corp., 471 U.S. at 485-86; Imo Indus., 155 F.3d at 259.

Plaintiffs base their jurisdictional argument almost entirely on the allegation that the Book “targets” Pennsylvania residents. While it is clear to the Court, and the parties concede, that the Book “targets” Decedent, the remaining issue is whether Decedent was a resident of Pennsylvania. Plaintiffs allege in their complaint that Decedent was a resident of Pennsylvania and that Decedent’s last known address was 2711 Lehman Street, Chester, Pennsylvania 19013. See Compl. ¶ 2. Defendant argues that Decedent was not a resident and includes a copy of a release signed by the Decedent stating that his address was 1353 Martel Avenue, Los Angeles, California 90028.¹ See Def.’s Mot. to Dismiss Ex. B. Since there is a factual dispute, the burden is on the Plaintiff to prove that jurisdiction is permissible. See Time Share Vacation Club, 735 F.2d at 66. The Court concludes that Plaintiffs have not sustained their burden. Plaintiffs allege in their complaint that Decedent was a Pennsylvania resident but do not offer sworn affidavits or any other competent evidence. Since Time Share Vacation Club makes clear that a plaintiff may not rely on the pleadings alone in order to withstand a defendant’s Rule 12(b)(2) motion, see id., the Court finds that Decedent was not a resident of Pennsylvania.

Because Decedent was not a Pennsylvania resident, Defendant has not “purposely directed” its activities toward a resident of the forum. See Burger King, 471 U.S. at 472. Defendant, therefore, does not have the requisite “minimum contacts” with Pennsylvania. See Id. Moreover, the mere foreseeability of causing harm² in the forum state is not a “sufficient benchmark” for exercising personal jurisdiction. Id. at 474. Forcing Defendant to defend itself

1. The Court recognizes that Plaintiffs dispute the validity of the model releases. The Court’s acknowledgment of the release for the purpose of Decedent’s address, however, does not speak to the legal effect of the releases.

2. Plaintiffs allege they will suffer injury from the Book because Defendants’ actions will lessen and dilute the value of Plaintiffs’ merchandising rights, and interfere with Plaintiffs’ ability to exploit, market, and license such rights. See Compl. ¶ 221.

in a foreign forum would also offend International Shoe's notion of fair play and substantial justice. Not only did Defendant not purposely direct its activities toward a resident of Pennsylvania, but also it appears that an insignificant number of books were sold in Pennsylvania, supporting Defendant's argument that it has not deliberately exploited the Pennsylvania marketplace.³ See Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 781 (1984). Since Plaintiffs have not come forward with any other evidence that would support the Court's jurisdiction, the Court will grant Defendant's motion to dismiss.

An order follows.

3. Nowhere in Plaintiffs' Response did Plaintiffs refute Defendant's allegations that Defendant has no subscribers in Pennsylvania and that only a few copies of the book were purchased in Pennsylvania.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

LINDA McKENNA and TINA IACONA	:	
Administratrices to the Estate of	:	
Nicholas Iacona a/k/a Joey Stefano,	:	
	:	
Plaintiffs,	:	CIVIL ACTION
	:	
v.	:	
	:	
SANDFORD MEISNER THEATER,	:	
et al.,	:	01-CV-660
	:	
Defendants.	:	

ORDER

AND NOW, this 18th day of July, 2001, upon consideration of Alyson Publications, Inc.'s (Defendant) Motion to Dismiss (Docket No. 9) and Linda McKenna and Tina Iacona's (Plaintiffs) Response thereto (Docket No. 11), it is ORDERED that Defendants' motion is GRANTED, and Plaintiffs' Complaint is DISMISSED for lack of personal jurisdiction.

BY THE COURT:

RONALD L. BUCKWALTER, J.